Jacomijn J. van Hof

Chapter 4. THE AWARD

4.3 ARTICLE 33: APPLICABLE LAW

4.3.4 Tribunal's practice

4.3.4.1 Choice of law rules

The rationale for creating this special category is the distinction between awards where the Tribunal applies, international law without any reference to national law and awards where the possibility of applying national law has been referred to but is expressly rejected. Transnational contracts, especially those involving state parties, may well be decided under international law - particularly if parties agree to this. This type of awards therefore does not cause as many Problems as those cases where the parties probably intended national law to apply, but although the Tribunal seems to have recognized this wish, perhaps discussed private international law rules, and even selected a national law, it subsequently rejected this law. In these cases, the Tribunal, somewhat like a deus ex machina, sometimes applies a international law/general principles of law.

The following cases may illustrate this phenomenon: CMI Int'l Inc. v. Iran concerns a claim of an Oklahoma Corporation against the Ministry of Roads and Transport of Iran, alleging a breach of two purchase orders that were part of a highway construction project in Iran. The Orders contained a choice of law clause, providing for the application of the law of the State of Idaho. The Tribunal stated that it did "not believe, however, that it [was] rigidly tied to the law of the contract, at least insofar as the assessment of damages is concerned". The Tribunal referred to Art. V CSD and the freedom it bestows on the Tribunal, arguing that its search is for justice and equity, "even where arguably relevant national laws might be designed to further other and doubtless quite legitimate goals". Even though the application of the UCC (as part of the law of Idaho) might not lead to a different result, the Tribunal preferred to analyze the damage question in accordance with general principles of law. This award has been discussed by many authors, such as Bellet, who notes...
merely that this is an example where the Tribunal has not hesitated to set aside classic rules of conflicts of laws. Others, such as Lloyd Jones and Stewart, have been stronger in their critiques, arguing that although some flexibility may be desirable, derogation from a specific choice of law by the parties may lead to uncertainties. On the other hand, this case may also be seen as an arguably appropriate example of the Tribunals application of "general principles of law" when application of the otherwise governing national law would have caused an unfair result.

In Gould Marketing v. Ministry of Defence, the Tribunal discussed the case of termination of a contract as a result of frustration due to the force majeure conditions in Iran. The contract provided for the application of California law. The Tribunal stated however, that "under American law, as under English law since 1943 the general principle applied to equitably allocate such consequences of frustration of contract is that amounts due under the contract are to be proportioned to the extent the contract was performed". Although the Tribunal did not use the term "reject" in this case, it clearly acknowledged the presence of a choice of law provision but decided the case on the basis of general principles.

In a case discussed earlier, DIC of Delaware, Inc. v. TRC188, a Part of the claim concerned a phase of the work with respect to which the parties disagreed as

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to whether a contract had been concluded or not. The Claimant argued it had and submitted evidence of an oral agreement. The Respondent, on the other hand, contended it had not and argued that the existing unsigned contract was without effect and that no work or payments had been performed. The Tribunal stated that if there were an oral agreement, it would be enforceable under Iranian law, which would be the applicable law (because of the connection with Iran, and the fact that in the contracts regarding the other phases, Iranian law had been Chosen). Although part performance could be proof of a binding contract under Iranian law, the Tribunal stated that "moreover" each forum applies its own procedural and evidentiary rules. Accordingly, it then stated that it is a general principle of law that the existence of oral contract can be proved by part performance. In the present case, it declared there was insufficient evidence. (Nevertheless, it continued that "it is well established under Iranian law and general principles of law that under the doctrine of quantum meruit there may be a recovery for work performed" and concluded that the Claimants were entitled to compensation for the value of work performed.)

The same thought occurs when reading Alan Craig v. Ministry of Energy. This case concerned an alleged nonpayment due under an engineering contract which that appeared to be governed by Iranian law. The Tribunal determined the contract was valid "even" under Iranian law and then had to decide if Art. 740 of the Code of Civil Procedure of Iran, a one-year statute of limitation, would apply. It decided that municipal Statutes of limitation are not binding on international tribunals, although such periods may be taken into account when determining the effect of an unreasonable delay in pursuing a claim. Bellet argues that this holding clearly rejects national law. Bellet, as a continental lawyer, however, based his opinion on the presumption that the issue of limitation is properly characterized as an issue of substantive law (which, for example, is the opinion expressed in the European Convention on Obligations). However, in the Anglo-Saxon tradition, one characterizes the issue as procedural, as Westberg appears to do. Consequently, the holding of the Tribunal may be seen as a mere

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application of the rule that a tribunal applies its own procedural rules - in this case the CSD and the Tribunal Rules.

Interestingly enough, in Iran National Airlines, Co. v. United States, Case B8, the Tribunal also addressed the application of the principle of extinctive prescription under international law. First, it rejected the applicability of municipal statutes of limitation, apart from their function to determine the effects of an unreasonable delay. Then, it continued that given the commercial nature of the transaction at issue, it did not consider it appropriate as a matter of public international law to apply the principle of extinctive prescription. Consequently it hold that it would decide the issue by reference to the fast whether or not there had been an unreasonable delay in filing the Claim. Referring to U.S. law in a similar case, the Tribunal hold that a delay up to six years was not unreasonable. With respect to some invoices, it considered it would be unfair to expect the Respondent to have retained its records, and consequently it dismissed the claims based on the invoices.

Time limitations based on a contractual Provision have been upheld, for example, in Iran v. United States, Case B1. This is an instance of the Tribunal's generally-favorable attitude towards enforcing contractual provisions.

Economy Forms would at first sight appear to be a straightforward application of private international law rules.
However, as arbitrator Holtzmann in his separate opinion emphasizes, the Tribunal, without any apparent need, relied on equity to determine lump-sum damages. In American Bell International Inc. v. Iran\textsuperscript{200}, the contract provided for application of Iranian law, but the Tribunal referred to "principles of law acknowledged in many legal systems" in determining the effect of a contractual limitation of liability clause, a reference that was criticized by arbitrator Mosk in his separate opinion.\textsuperscript{201} Similarly, in Parguin Private Joint Stock Co. v. United States\textsuperscript{202}, the Tribunal bluntly rejected the Respondent's argument that U.S. law applied to the issue of interest. It held that it was its practice to award interest, regardless of the relevant contract provisions and of the general choice of law provisions.\textsuperscript{203}

In other cases, the Tribunal did not overrule the applicable law by referring to general principles, but rather by referring to the provisions of the contract, or by merely referring to what it considered reasonable or fair. For instance, in Bendix Corp. v. Iran\textsuperscript{204}, the Claimant argued that New York law applied, under which it was entitled to request assurance of performance when reasonable grounds for insecurity arise. Although the Tribunal referred to the UCC, which forms a part of New York law, and might thus be considered as applying New York law to some extent, the Tribunal stated that "it need not reach the question of the applicability of New York law" and dismissed the claim for lack of proof (of the reasonable grounds for insecurity).

In Iran National Airlines Co. v. United States, Case B1\textsuperscript{205}, the parties were divided on the issue of the applicable law. It is interesting to note that, even though this might be considered a claim which should be determined under international law, neither of the parties so argued, nor did the Tribunal consider international law when it determined the law applicable to the merits.\textsuperscript{206} The Claimant sought recovery of unpaid invoices for airline tickets issued to U.S. Navy Officials. The Respondent argued that U.S. law applied because the tickets were based on a "Government Travel Request", which created a contract between the relevant U.S. Agency and the carrier subject to U.S. law. The Claimant on the other hand denied that this Request created a contract and argued instead that the airline tickets consulted the contract. In support, it referred to the IATA Regulations and Conventions such as the Warsaw Convention and argued that Iranian law governed the contract. Unfortunately, the Tribunal held that there was no need to refer to any applicable law; instead, the practice of the parties and the relevant provisions of the contract "formed by the GTR and the passenger ticket" (emphasis added), including the terms and conditions contained in both, were sufficient. Only if those terms were inconsistent or incomplete, which it did not find, would it have considered a question of the applicable law.

In Sola Tiles, Inc. v. Iran\textsuperscript{207}, the Tribunal needed to determine the law governing the question of the validity of the assignment of assets and liabilities of a company.\textsuperscript{208} The Claimant had argued that California law applied because the transfer had been executed and delivered in that State. The Respondent, however, claimed the assignment was governed by the Commercial Code of Iran, as it concerned an Iranian company. Furthermore, it alleged that certain formalities of this law with respect to notarization (through the Iranian consul) had not been fulfilled. The Tribunal considered that under California law, the transfer would be valid, whereas under Iranian law it was not. Consequently, it decided that, irrespective of the effect to a third party, it would be inequitable vis-à-vis Iran to find the assignment invalid, as Iran itself was responsible for the circumstances that make it impossible to comply with the requirements. Without having to determine the

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applicable law, it determined the assignment was valid for the present case. It seems, however, that if the Tribunal had been more precise in its characterization, it would not have needed to rely on equity. A formal requirement should be distinguished from a substantive issue. Consequently, the fact that Iranian law governed the issue of the substantive validity of the transfer did not imply that the same law governed the issue of the formal validity of the transfer. Rather, it could be deemed sufficient that the requirements of the law of the place of assignment - in the present case, those of California law - were fulfilled.\textsuperscript{209}

In Housing and Urban Services Int'l Inc. v. TRC\textsuperscript{210}, the question arose whether the Claimant had locus standi individually or whether he would be able to file suit only with his partner, a German company. If the latter was true, he would not be able to file a suit because the German Company had no locus standi before the Tribunal due to its nationality. First, the Tribunal considered that

"[t]he Parties agree, and the Tribunal deems this to be correct, that both Agreements are covered by Iranian law and that consequently Iranian law determines the relationship between [the Claimant] and [the German intermediate] and that consequently Iranian law determines the relationship between [them]."\textsuperscript{211}
Subsequently, the Tribunal had to determine the issue of *locus standi* and stated that Iranian law did not deal specifically with this question. It continued that "while the Tribunal may take municipal law as its 'point of departure', it must look as well to international law on this question." It held that under international law, the Claimant could bring its claim individually.

From these cases one can derive the perhaps debatable conclusion that the Tribunal's practice accords with modern practice of applying general principles and contractual provisions. The doctrine of public policy might provide theoretical support from a private international law point of view. If general principles of law are seen as part of international law, one can argue they should be given the status of international public policy and should be given effect over any applicable national law. This perspective should be applied with some care, however, and consistently with the function of public policy as an *ultimum remedium*, a last resort.

correction method. The attitude of the Tribunal would seem to rely too heavily on this concept. [...]
See supra para 4.3.4.1 a. (regarding the law applicable to the transfer of shares, namely the law of the place where the shams where issued). Mostafavi in his dissenting opinion also referred to the principle of law applicable to shares (which the Tribunal indeed applied subsequently in Sedco), but he, too, failed to distinguish between substantive and procedural aspects, as he argued Art. 1287 Iranian CC had not been complied with. See 14 Iran-U.S. C.T.R. at 244-150.

This rule, known as that of locus regit actum, is well established. See, e.g., Art. 9,1 of the European Convention on the Law Applicable to Contractual Obligations, OJ EC L. 266/1 (Oct. 9, 1980).


Id. at 326.

Id. at 330.

Brower, in his dissenting opinion to International Systems & Contracts Corp. v. Iran, Award No. 256-439-2, 12 Iran-U.S. C.T.R. at 273, states that the Award correctly implies that in determining the Tribunals jurisdiction in light of the question of the ownership of the claim, both sources of law, international as well as municipal, should be taken into account. This case should be distinguished from Housing and Urban Services, however, because in International Systems the question of the boundaries of the general jurisdiction of the Tribunal was considered to be governed by international law (understandable because of its basis in the CSD), and the question of ownership rights in the particular case was considered to be governed entirely by municipal law. In Housing and Urban Services, the Tribunal determined that with respect the issue of locus standi in the particular case, municipal law was only the relevant consideration, and consequently, it considered international law.

See also, Crook, Applicable Law at 298, (stating that “the Tribunal has treated numerous doctrines as general principles, usually without detailed explanation of their underpinnings. Most are simple and familiar to international commerce and to many legal systems. Nevertheless, the Tribunals jurisprudence also shows the temptations general principles can offer to arbitrators facing difficult and sensible issues”).